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Supreme Court of the United States

October Term, 1968.

No. [redacted] 9

NACIREMA OPERATING CO., INC. and LIBERTY MUTUAL INSURANCE COMPANY,

Petitioners,

v.

WILLIAM H. JOHNSON, JULIA T. KLOSEK and ALBERT AVERY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

BRIEF OF NATIONAL ASSOCIATION OF STEVEDORES, PACIFIC AMERICAN STEAMSHIP ASSOCIATION, LAKE CARRIERS ASSOCIATION, ET AL., AMICI CURIAE.

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INDEX.

	Page
Statement of Interest	1
Issues Not Covered in the Petition	2
Reasons for Granting the Writ	3
Conclusion	8

TABLE OF CITATIONS.

Cases: Page

American Export Lines, Inc. v. Revel, 266 F. 2d 82 (4 Cir. 1959) 6

Calbeck v. Travelers Ins. Co., 370 U. S. 114, 8 L. ed. 2d 368, 82 S. Ct. 1196 (1962) 3, 4, 5

Hastings v. Mann, 340 F. 2d 910 (4 Cir. 1965) 6

Houser v. O'Leary, 383 F. 2d 730 (9 Cir. 1967), cert. den. 390 U. S. 954 (1968) 2, 6

Johnson v. Traynor, 243 F. Supp. 184 (1965) 4, 7

Knickerbocker Ice Co. v. Stewart, 253 U. S. 149, 64 L. ed. 834 40 S. Ct. 438 (1920) 3

Michigan Mutual Liability Co. v. Arrien, 344 F. 2d 640 (1965) 5

Nicholson v. Calbeck, 385 F. 2d 221 (5 Cir. 1967), cert. den. 389 U. S. 1051 (1968) 2, 6

Pillsbury v. United Engineering Co., 342 U. S. 197, 96 L. ed. 225, 72 S. Ct. 223 (1952) 6

Southern P. Co. v. Jensen, 244 U. S. 205, 61 L. ed. 1086, 37 S. Ct. 524 (1917) 3

State Industrial Commission of State of New York v. Nordenholt Corp., 259 U. S. 263, 42 S. Ct. 473, 66 L. ed. 933 (1922) 6

Swanson v. Marra Brothers, 328 U. S. 1, 66 S. Ct. 869, 90 L. ed. 1045 (1946) 5

Travelers Insurance Company v. Shea, 382 F. 2d 344 (5 Cir. 1967), cert. den. 389 U. S. 1050 (1968) 2, 5

Washington v. W. C. Dawson & Co., 264 U. S. 219, 68 L. ed. 646, 44 S. Ct. 302 (1924) 3

Statutes: Page

Longshoremen's and Harbor Workers' Compensation Act as amended, 33 U. S. C. A. § 903(a) .....1, et seq.

Admiralty Extension Act of 1948, 46 U. S. C. A. § 740 7

TABLE OF CITATIONS (Cont'd)

Other Authorities:

	Page
Benedict on Admiralty, § 29, page 64, 6th Edition	6
Gilmore & Black, The Law of Admiralty, § 6-46, page 339, 1957 Edition	6
Robinson on Admiralty, § 11, page 81, 1939 Edition	6

Legislative History of the Longshoremen's and Harbor Workers' Compensation Act:

	Page
Hearings before the Senate Judiciary Committee on S 3170, 69th Cong., 1st Sess.	3
Hearings before the House Judiciary Committee on S 3170, 69th Cong., 1st Sess.	3
Hearings before the House Judiciary Committee on HR 9498, 69th Cong., 1st Sess.	3
S Rep. No. 973, 69th Cong., 1st Sess.	3
HR Rep. No. 1767, 69th Cong., 2d Sess.	3
HR Rep. No. 1190, 69th Cong., 1st Sess.	3

STATEMENT OF INTEREST.

This brief, amici curiae, is filed in support of the petition for certiorari in the above-entitled cases.[1]

The parties hereto are as follows: National Association of Stevedores, Pacific American Steamship Association, Lake Carriers Association, Master Contracting Stevedore Association of the Pacific Coast, Inc., West Gulf Maritime Association, Philadelphia Marine Trade Association, and the North Atlantic Ports Association.[2]

The specific question presented in this appeal is whether injuries sustained by longshoremen on a pier are covered under the Longshoremen and Harbor Workers' Compensation Act (33 U. S. C. A. § 903(a)) (hereinafter

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1. The consent of all the parties to the above cases to the filing of this brief, amici curiae, was mailed to the Clerk of this Court on September 13, 1968.

2. The National Association of Stevedores represents the vast majority of the major contract stevedoring companies located in every port throughout the United States.

The Pacific American Steamship Association represents American shipowners domiciled on the Pacific Coast.

The Lake Carriers Association is comprised of some twenty-two separate companies owning and/or operating a total of two hundred and six (206) United States flag vessels in the Great Lakes.

The Master Contracting Stevedore Association of the Pacific Coast, Inc. represents all of the stevedoring companies in California, Oregon, Washington and Alaska who are the direct employers of all longshoremen on the Pacific Coast.

The West Gulf Maritime Association represents steamship owners, operators, agents and stevedoring contractors in all the Texas ports and the Port of Lake Charles, La.

The New Orleans Steamship Association represents steamship owners, operators, agents and stevedoring contractors in the Port of New Orleans.

The Philadelphia Marine Trade Association likewise represents steamship owners, operators, agents and stevedoring contractors in the Port of Philadelphia.

The North Atlantic Ports Association is a regional association of approximately one hundred members consisting of steamship lines, terminal operators, port authorities and stevedoring contractors from Maine to Virginia.

"Longshoremen's Act") or, as uniformly held until the decision below, are such injuries covered by the applicable State compensation acts.

All of the above named parties have a profound and vital interest in the resolution of the question involved. These parties act as the spokesman for practically all of the employers and/or employer associations in the United States who are involved in the employment of longshoremen. For this reason they seek to acquaint the Court with the views of a substantial segment of the maritime industry as a whole as to why the petition for a writ of certiorari should be granted.

ISSUES NOT COVERED IN PETITION.

The main portion of the petition filed in the instant cases is devoted to demonstrating that the decision below of the Court of Appeals for the Fourth Circuit is erroneous and in conflict with the recent decisions of the Court of Appeals for the Fifth Circuit,[3] and with the recent decision of the Court of Appeals for the Ninth Circuit;[4] and that the question presented is of exceptional importance to the maritime industry of this country. While agreeing fully with the reasons covered in the petition, we respectfully submit that there are at least three other important reasons why the petition should be granted:

1. The decision below nullifies the will of Congress as set forth in the Longshoremen's Act;

2. The decision below is contrary to decisions of this Court in at least two cases;

3. The decision below is contrary to a recent decision of the Court of Appeals for the Second Circuit.

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3. *Travelers Insurance Company v. Shea,* 382 F. 2d 344, cert. den. 389 U. S. 1050, and *Nicholson v. Calbeck,* 385 F. 2d 221, cert. den. 389 U. S. 1051.

4. *Houser v. O'Leary,* 383 F. 2d 730, cert. den. 390 U. S. 954.

We believe it will be helpful to this Court to have these additional reasons developed. This brief is therefore addressed to that task.

REASONS FOR GRANTING THE WRIT.

The Longshoremen's Act has been the subject of extensive litigation. However, there can be no serious doubt from the legislative history of the Act and the myriad cases subsequent to the Act that it was not enacted to provide coverage for longshoremen injured while working on a pier.

The genesis of the Act was the Jensen case (*Southern P. Co. v. Jensen*, 244 U. S. 205, 61 L. ed. 1086, 37 S. Ct. 524), which decided that State compensation acts could not cover a longshoreman's injury which occurred on a gangplank between a pier and a vessel. After Jensen, Congress tried unsuccessfully on two occasions to grant to the States jurisdiction over all longshore injuries. These statutes were set aside by this Court.[5] As a result, the Longshoremen's Act thereafter was passed solely and exclusively to cover injuries which occurred between a pier and vessel, on a vessel and at a dry dock.[6]

This Court, in *Calbeck v. Travelers Ins. Co.*, 370 U. S. 114, 8 L. ed. 2d 368, 82 S. Ct. 1196, after an exhaustive review of the legislative history of the Longshoremen's Act made it crystal clear that the purpose of that Act was to

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5. *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, 64 L. ed. 834, 40 S. Ct. 438; *Washington v. W. C. Dawson & Co.*, 264 U. S. 219, 68 L. ed. 646, 44 S. Ct. 302.

6. For legislative history see: Hearings before the Senate Judiciary Committee on S 3170, 69th Cong., 1st Sess.; Hearings before the House Judiciary Committee on S 3170, 69th Cong., 1st Sess.; S Rep. No. 973, 69th Cong., 1st Sess.; HR Rep. No. 1767, 69th Cong., 2d Sess. See also HR Rep. No. 1190, 69th Cong., 1st Sess. (accompanying HR 12063); Hearings before the House Judiciary Committee on HR 9498, 69th Cong, 1st Sess.

provide Federal compensation "in every case, that is, where Jensen might have seemed to preclude State compensation." 370 U. S. at 373. The *Jensen* case never raised any question as to the validity of State jurisdiction covering longshoremen's injuries on a pier.[7]

The interpretation placed on the Longshoremen's Act by the Bureau of Employers Compensation is also highly significant. The District Court in the *Johnson* and *Klosek* cases (*Johnson v. Traynor*, 243 F. Supp. 184 (1965) succinctly pointed out that:

> "The Bureau of Employees Compensation of the United States Department of Labor which has been charged with administering the Longshoremen's Act since it was passed, has consistently construed it as not applying to injuries occuring upon a wharf. Opin-

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7. This Court on four separate occasions in *Calbeck, supra*. pointed out that the Longshoremen's Act was only intended to cover injuries which occurred "on navigable waters." The Court said:

> "Our conclusion is that Congress invoked its constitutional power so as to provide compensation for all injuries sustained by employees on navigable waters . . . (U. S. at 117, L. ed. 371).
>
> There emerges from the complete legislative history a congressional desire for a statute which would provide federal compensation for all injuries to employees on navigable waters; . . . (U. S. at 120, L. ed. 373).
>
> In sum, it appears that the Longshoremen's Act was designed to ensure that a compensation remedy existed for all injuries sustained by employees on navigable waters, . . . (U. S. at 124, L. ed. 375).
>
> We conclude that Congress used the phrase "if recovery . . . may not validly be provided by State law" in a sense consistent with the delineation of coverage as reaching injuries occurring on navigable waters. By that language Congress reiterated that the Act reached all those cases of injury to employees on navigable waters as to which Jensen, Knickerbocker and Dawson had rendered questionable the availability of a state compensation remedy." (U. S. at 126, L. ed. 376).

ion No. 16, 1927 A.M.C. 1855. The court is advised that the Bureau still construes the Act as not covering injuries which occur wholly upon a wharf." (id. at 191)

In 1946, in *Swanson v. Marra Brothers,* 328 U. S. 1, 66 S. Ct. 869, 90 L. ed. 1045, this Court unequivocally reaffirmed the principle that injuries occurring on a pier were not covered under the Longshoremen's Act. There, this Court said:

> "But since this Act is restricted to compensation for injury occurring on navigable waters, it excludes from its own terms and from the Jones Act any remedies against the employer for injuries inflicted on shore." (U. S. at 7, L. ed. 1049.)

The Court of Appeals for the Second Circuit in *Michigan Mutual Liability Co. v. Arrien,* 344 F. 2d 640 (1965), after referring to *Swanson v. Marra Brothers, supra,* and the legislative history of this Act, stated that "injuries upon wharves or other extensions of land permanently covering navigable waters were not to be covered." The Court said:

> "A wharf or pier is usually built on pilings over what *was* navigable water. When the structure is completed, the water over which it is built is *permanently* removed from navigation as if the structure had been in the first instance built on land." (Emphasis in decision) (id. at 644)

The Court of Appeals for the Fifth Circuit in *Travelers Ins. Co. v. Shea,* 382 F. 2d 444 (1967), pointed out that: "The coverage of the Act is not keyed to function but has

uniformly been situs-oriented."[8] The Court reiterated that structures such as wharves, piers and docks affixed permanently to shore traditionally have been held to be extensions of land and any remedies for injuries occurring on such structures have been held to be restricted to those afforded by local law.[9] The Court said:

> "If injuries occurring 'over' as well as 'upon' navigable waters were Congressionally intended to be covered by the Longshoremen's Act, the statute could and would have so read. It does not." (id. at 347)

As recently as September, 1967, the Ninth Circuit in *Houser v. O'Leary, supra,* held that a pier injury was not covered by the Longshoremen's Act. This Court denied certiorari in 390 U. S. 954 on March 4, 1968.

Again, in *Nicholson v. Calbeck, supra,* decided October, 1967, the Fifth Circuit also decided that a pier injury did not come within the provisions of the Longshoremen's Act. This Court denied certiorari (389 U. S. 1051) in that case on January 15, 1968.

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8. The Court below commited reversible error in concluding that "Congress designed the Act to be status oriented", thereby misconstruing the true intent and purpose of the Act which was predicated upon "situs"—the place where the injury occurred and not upon "status"—the function being performed. This Court in *Calbeck, supra,* made it unmistakably clear that the Longshoremen's Act was based on situs and not status. See footnote 7, *supra.*

9. Indeed, until the decision below this principle has been uniformly upheld. See: *State Industrial Commission of State of New York v. Nordenholt Corp.,* 1922, 259 U. S. 263, 42 S. Ct. 473, 66 L. ed. 933; *American Export Lines, Inc. v. Revel,* 4 Cir. 1959, 266 F. 2d 82, 84; see also: *Hastings v. Mann,* 4 Cir. 1965, 340 F. 2d 910, 911-912; Benedict on Admiralty, section 29, page 64, 6th Edition; Gilmore & Black, The Law of Admiralty, section 6-46, page 339, 1957 Edition; and Robinson on Admiralty, section 11, page 81, 1939 Edition.

Up until the decision below, not a single case decided that the Longshoremen's Act covered a pier injury. The Court below in attempting to support its ruling has relied upon its own conception of what is fair and equitable with respect to injuries occurring on a pier. But this is a function of Congress and Congress was asked to cover pier injuries and chose not to do so.[10] Certainly the Court below has no right to extirpate the will of Congress by judicial legislation. As this Court said in *Pillsbury v. United Engineering Co.*, 342 U. S. 197, 96 L. ed. 225, 72 S. Ct. 223, (1952), referring to the Longshoremen's Act:

> "We are aware that this is a humanitarian act, and that it should be construed liberally to effectuate its purposes; but that does not give us the power to rewrite the statute of limitations at will, and make what was intended to be a limitation no limitation at all. . . . While it might be desirable for the statute to provide as petitioners contend, the power to change the statute is with Congress, not us." (U. S. at 200, L. ed. 229)

There is also no substance in the Lower Court's reference to the Admiralty Extension Act (46 U. S. C. A. § 740), enlarging the jurisdiction of the Longshoremen's Act. This point has been exhaustably analyzed and refuted in the decision by the District Court in *Johnson v. Traynor, supra.* Briefly, it is pointed out there that in the Longshoremen's Act Congress deliberately used the phrase "navigable waters" in preference to the phrase "admiralty jurisdiction," which was used in the Admiralty Extension Act. That Act was not an express amendment to the Longshoremen's Act as its legislative history demonstrates. Similarly, a contemporaneous amendment of the Longshoremen's Act contains no cross-reference to the Admiralty Extension Act.

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10. See legislative history in footnote 6.

Finally, House Report No. 2287, which was submitted some 10 years after the enactment of the Extension Act, sets forth the Congressional understanding that injuries upon wharves and other extensions of land were not within the coverage of the Longshoremen's Act.

Consequently, unless the decision below is reviewed by this Court substantial misconception and confusion will persist and multiply in all the Circuits with respect to the proper interpretation of the Longshoremen's Act involving pier injuries. The lower Court's decision is a clear violation of Congressional intent and of the decisions of this Court. Certiorari should be granted and the decision below should be reversed.

CONCLUSION.

For the foregoing reasons, as well as those stated in the petition, we respectfully submit that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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